

The FCC also asks commentors to indicate how its national rules can best be crafted to assist the states in carrying out their responsibility for arbitrating disputes. NPRM at ¶ 34. Further, the FCC requests comment on the costs, benefits, and consequences of variations among the states, as well as whether FCC rules can still allow states to implement state policies. NPRM at ¶ 35. The FCC regulations established in this NPRM should be minimum guidelines and should contain provisions under which exceptions are permissible. Thus, the states and the parties can "meet" the requirements of Section 251, as Section 252(c) requires, while retaining much needed flexibility and discretion. Since Congress determined that the states play a vital role in the development of competition in the local exchange service markets of this country, the FCC should not prescribe how every detail must be accomplished. National guidelines should not effectively determine the various duties of all LECs; otherwise there would be no need for negotiation, arbitration, or state contract review.

Minimally acceptable guidelines under Section 251 will assist the parties and the states in their negotiation, mediation, and arbitration activities and still afford the parties and the states some flexibility to determine what is appropriate under the circumstances. In some cases, the PUCO suggests that no fee regulations are necessary where the obligations and requirements of the 1996 Act are clear on their face. Reserving flexibility for

means other than complaint proceedings. With respect to state enforcement, Section 10(d) of the 1996 Act makes clear that FCC forbearance under Title 47 only preempts state enforcement of Title 47 U.S.C. and does not preclude enforcement of similar or comparable state laws. Further, Section 10 of the 1996 Act allows the FCC to tailor its forbearance orders specifically to "any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services." Section 10 of the 1996 Act. In any event, forbearance from complaint proceedings is not necessary to preserve concurrent state jurisdiction over such matters, but would facilitate any FCC goal of leaving such matters exclusively to states.

states is not only compatible with, but desirable under the pro-competitive, de-regulatory framework envisioned by Congress. Moreover, minimally acceptable guidelines under Section 251 will preserve meaningful role of the states in arbitrating and approving such agreements, as envisioned by the 1996 Act.

Instead of adopting the unduly prescriptive approach tentatively embraced in the NPRM, the FCC should reserve flexibility and discretion for the states in accord once with the regulating model outlined above. This approach will alleviate the major jurisdictional conflict staged by the NPRM, which conflict will most certainly cause delay and confusion, as well as operate to undercut and disrupt the cooperative federal/state regulatory paradigm so clearly intended by Congress. The approach advocated by the staff would better conform to the letter and spirit of the 1996 Act regarding the federal/state cooperative regulatory paradigm, in addition to respecting the important jurisdictional provisions of the 1934 Act. Finally, the Ohio approach would allow states to stay within their respective legal requirements regarding rate setting methodologies and would not subject states to a "do or die" approach to pricing principles as contemplated by the NPRM.

Notwithstanding the FCC's laudable goals, the approach set forth in the NPRM could inhibit and delay local competition as explained above, and should be reconsidered in favor of a more cooperative approach. The cooperative approach would be the most efficient, effective method for fostering local competition and would preserve state authority and discretion in implementing the 1996 Act. More details about this cooperative approach are set forth in the remaining portions of these comments. The foregoing legal arguments and overview represent the views and opinions of the Public Utilities Commission of Ohio. What follows below are technical comments

that reflect the current position of the PUCO Staff. As stated above, the PUCO is close to finalizing its comprehensive local competition rules in a pending docket, Case No. 95-845-TP-COI. Therefore, some of the detailed technical recommendations advocated below are subject to change in the PUCO's final rules that will be issued well before the FCC finalizes this NPRM. The PUCO plans to submit its final rules as a late-filed attachment in this NPRM docket.

In addition to this qualification regarding the pendency of the Ohio rulemaking proceeding, the FCC should also bear another matter in mind when reviewing the remainder of Ohio's comments. Some of the detailed recommendations below reflect the approach advocated only where the FCC chooses to implement specific regulations (against Ohio's overall recommendation that the FCC adopt minimal regulations that preserve state discretion and flexibility). In other words, Ohio strongly prefers that general guidelines be issued, but does set forth some specific recommendations for input if the FCC chooses to promulgate specific regulations as contemplated in the NPRM.

B. Obligations Imposed by Sections 251(c) on "ILECs"

1. Duty to Negotiate in Good Faith (§§ 45-48)

The questions posed here are whether the FCC should establish national rules/guidelines regarding good faith negotiations, what those rules should be, the extent that some practices should be deemed to violate the duty to negotiate, and what legal precedent should be relied upon in establishing national guidelines. NPRM at ¶ 47.

The PUCO Staff contends that it is not necessary for the FCC to establish guidelines for good faith negotiations under Section 251(c)(1) of the 1996 Act because violations of this duty should be determined on a case-by-case basis and upon review of all of the facts. The PUCO Staff believes that the

circumstances under which a violation of the duty to negotiate in good faith can vary. However, if the FCC determines that it should establish guidelines regarding good faith negotiations under Section 251(c)(1), those guidelines should not prescribe the manner in which all LECs must fulfill their duties regarding resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation. Any guidelines that the FCC implements should determine minimally acceptable behavior and not be hard-and-fast rules for negotiations.

Next, we turn to the question of whether Sections 252(a)(1) and (e)(1) require parties to submit existing interconnection agreements to state commissions for approval and whether one party to an existing agreement can compel re-negotiation (and arbitration) under Section 252. NPRM at ¶ 48. The PUCO has received a petition from AT&T Communications of Ohio, Inc. requesting that, in order to comply with the 1996 Act, the PUCO require all ILECs to file all existing interconnection and service agreements, including agreements between LECs and end users. This case is in the pleading cycle and no evidence has been presented to the PUCO. Therefore, we do not believe it is appropriate, at this time, to respond to the FCC's comment request regarding an interpretation of the 1996 Act on this issue.⁹

The FCC also is seeking comments on whether state commissions are permitted to impose on new entrants requirements that the 1996 Act imposes on ILECs, and whether this would be consistent with the 1996 Act's obligations of telecommunications carriers, LECs and ILECs. NPRM at ¶ 45.

Section 251(d)(3) of the 1996 Act preserves a state's authority to enforce any regulation, order or policy that establishes access and interconnection

⁹ For the same reasons, the PUCO does not believe it is appropriate to respond to the FCC's comment requests in ¶ 170 and 171 of the NPRM.

obligations of LECs and does not substantially prevent implementation of the requirements of Section 251. Furthermore, Section 252(e)(3) establishes that a state commission is not prohibited from establishing or enforcing requirements of state law in its review of interconnection agreements, if such requirements are consistent with the authority granted states under Section 253(b). Accordingly, the PUCO Staff contends that it is permitted to exercise its authority under the 1996 Act to impose on new entrants requirements that the 1996 Act imposes on ILECs. Retention of such authority by the states will likely result in more authentic and balanced negotiations between ILECs and new entrants.

2. Interconnection, Collocation, and Unbundled Elements

a. Interconnection (§50-53)

The FCC tentatively concludes that uniform interconnection rules would facilitate entry by competitors in multiple states by removing the need to comply with a multiplicity of state variations in technical and procedural requirements. However, the FCC seeks comments on whether there are instances wherein the aims of the 1996 Act would be better achieved by permitting states to establish different interconnection approaches. NPRM at ¶ 51.

The interconnection requirements imposed in each state should be consistent with prevailing technical, geographical, demographical, and regulatory conditions, so should be determined on a state-specific basis. Deployed networks vary significantly among states, depending on the extent to which previous regulatory practices or competitive pressures have promoted network investment. State-specific EAS considerations, or preferences for flat vs. measured rates will bear upon the appropriateness of

specific pricing standards. The level of unbundling of network elements will vary among states as bona fide requests dictate, hence the set of technically feasible points of interconnection will vary among networks. For these reasons, the PUCO recommends that states be permitted to establish their own interconnection requirements. Currently, ILECs have varying methods and modes of interconnection in different states or regions. It follows that such variations among ILEC practices should not affect the new entrants ability to plan and configure national networks. The PUCO Staff would recommend that all LECs be required to provide interconnection at any technically feasible point including tandem offices, end offices, or any technically feasible meet point, utilizing Feature Group D (FGD) type interconnection, and using one-way or two-way trunks.

Due to the difference in pricing standards for "interconnection" and "transport and termination" in Sections 252(d)(1) and 252(d)(2), respectively, the FCC seeks comments on the relationship between the obligation of the ILECs to provide "interconnection" under Section 251(c)(2) and the obligation of all LECs, to establish reciprocal compensation arrangements for the "transport and termination" of telecommunications pursuant to Section 251(c)(2). NPRM at ¶ 53.

It is the PUCO Staff's opinion that the obligation to provide interconnection under Section 251(c)(2) is placed on the ILECs only to insure that ILECs open their networks to the new entrants since incumbents are the current providers of the ubiquitous public switched network. However, once the physical interconnection is established between carriers, it is the responsibility of incumbents and new entrants alike to establish reciprocal compensation arrangements, since each carrier maintains bottleneck facilities

enabling the termination of traffic to their end users that originates on the other carrier's network.

The FCC seeks comment on the question of how to interpret the term "interconnection" in Section 251(c)(2), NPRM at ¶ 54. The PUCO Staff interprets the term "interconnection" in this context as referring specifically to the facilities and equipment physically linking two networks at the first point of interface between the networks. The term "interconnection" does not include the transport and termination services provided by such linkage. This interpretation poses no overlap between this Section and Section 251(b)(5) for reciprocal compensation for transport and termination of traffic.

**(1) Technically Feasible Points of
Interconnection (¶¶ 56-59)**

The FCC seeks comments on what constitutes a "technically feasible point" within the ILEC's network for the purpose of the interconnection obligation established by Section 251(c)(2)(B). NPRM at ¶ 56. The FCC tentatively concludes that the minimum federal standard should provide that interconnection at a particular point shall be considered technically feasible within the meaning of Section 251(c)(2) if the ILEC currently provides, or has provided in the past, interconnection to any other carrier at that point, and that all ILECs that employ similar network technology should be required to make interconnection at such points available to requesting carriers. NPRM at ¶ 57.

In keeping with current practices among telecommunications carriers, the PUCO Staff recommends that ILECs be required at a minimum to offer interconnection to requesting carriers at end offices, tandem offices, or meet points. As pointed out above, the provisioning of unbundled access under Section 251(c)(3) will likely require interconnection at network sites

determined by the specific network characteristics of the requesting carriers, which will vary among states.

Authority to assess the technical feasibility of interconnection points should rest with the states, since interconnection feasibility is dependent upon the technology, deployed within each state. The PUCO Staff recommends that the FCC defer to states the establishment of minimum standards regarding the technical feasibility of interconnection points, and defer to the states the evaluation of the feasibility of new points of interconnection, e.g., at the ILEC's SCP (Service Control Point) for SS7 network interconnection or at the ILEC's 9-1-1 control office for interconnection with the ILEC's 9-1-1 network.

In view of the importance of maintenance of network reliability and in light of the substantial market and regulatory experience possessed by the incumbents, it is reasonable to place the burden of proof on carriers alleging that a specific point of interconnection would result in diminished network performance.

**(2) Just, Reasonable, and Nondiscriminatory
Interconnection (§§ 61-62)**

The FCC seeks comments on: (a) how to determine whether the terms and conditions for interconnection arrangements are just, reasonable, and nondiscriminatory, (b) whether the FCC should adopt uniform national guidelines governing installation, maintenance, and repair of the ILEC's portion of the interconnection facilities, and (c) whether the FCC should adopt standards for the terms and conditions concerning the payment of the non-recurring costs associated with installation. NPRM at §§ 61-62. With respect to pricing issues, these comments address the proper methodology for

determining just, reasonable, and non-discriminatory rates below in Sections II.B.2.d.

Section 252(e)(3) and 252(f)(3) preserves that states' authority to establish or enforce requirements of state law in its review of an interconnection agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. In view of this provision, the PUCO Staff recommends at a minimum that installation, maintenance, and repair of the ILEC's portion of the interconnection facilities be based on the Network Reliability Counsel (NRC) II "Bilateral Agreement Template for Network Interconnection" recommendation, and that LECs be subject to state-specific modifications as required by state law to comply with the intrastate telecommunications service quality standards.

The PUCO Staff recommends that installation, maintenance, and repair of ILECs' interconnection facilities be subject to state-specific Minimum Telephone Service Standards (MTSS). Section 252(e)(3) specifically permits states to utilize state service quality standards in arbitrating and reviewing interconnection issues. Regarding the payment of non-recurring costs associated with the installation of interconnection facilities, the PUCO Staff recommends that the providing carrier (ILEC or new entrant) be allowed to charge the requesting carrier an "application fee" to ensure the good faith nature of the interconnection request. The PUCO Staff would limit this charge to reasonable costs incurred in processing the application and surveying facilities to determine how to accommodate the interconnection request.

(3) Interconnection that is Equal in Quality
(¶ 63)

The FCC seeks comment on what criteria may be appropriate in the determination of whether interconnection is "equal in quality" to that provided by the ILEC to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection, pursuant to the requirements of Section 251(c)(2)(C). The FCC also seeks comment on whether these criteria should be adopted as a national standards or whether the competitive objective would be better achieved by allowing variations among states. NPRM at ¶ 63.

The PUCO Staff recommends that state guidelines governing installation, maintenance, repair, and testing, be developed and enforced by states to assure the "equal in quality" interconnection requirement of Section 251(c)(2)(C) is met. Adopting a national standard is neither practical nor reasonable since technical, geographic, and demographic conditions vary considerably among states and dictate alternative interconnection considerations. States have substantial authority and experience developing and enforcing service quality standards. Also, a national requirement may violate the nondiscriminatory rule if it imposes requirements that differ from what is currently offered to incumbent carriers. Furthermore, Section 252(e)(3) permits state commissions to establish or enforce the requirements of their state laws in their review of an interconnection agreement, including requiring compliance with intrastate telecommunication service quality standards or requirements.

**(4) Relationship between Interconnection
and Other Obligations Under the 1996 Act
(¶¶ 64-65)**

The FCC seeks comments on the tentative conclusion that it has the authority to require, in addition to physical collocation, virtual collocation and meet point interconnection arrangements, as well as any other reasonable method of interconnection. The FCC also seeks comment on various state requirements regarding methods of interconnection. NPRM at ¶¶ 64-65.

Section 251(c)(6) merely imposes a duty upon LECs and does not expressly limit the states' authority to establish rules requiring ILECs to make available a variety of technically feasible methods of interconnection, including meet point arrangements as well as virtual collocation. In fact, that provision contemplates that LECs will be seeking guidance from states by making the proper showings "to the state commission." Section 251(c)(6). The PUCO Staff recommends that all LECs be required to provide physical collocation if so requested by the interconnecting party. A LEC should be required to offer virtual collocation if it demonstrates to the PUCO that physical collocation is not practical for technical reasons or because of space limitations. The PUCO Staff also recommends that all LECs offer meet point arrangements upon request.

b. Collocation (¶¶ 66-70 72-73)

The FCC tentatively concludes that the FCC should adopt national standards where appropriate to implement the collocation standards of the 1996 Act. NPRM at ¶ 67. The FCC seeks comments on whether these standards can be set by readopting the FCC's prior standards governing physical and virtual collocation that were established in the *Expanded*

Interconnection proceeding. NPRM at ¶ 73. The FCC requests information concerning specific state approaches regarding collocation. NPRM at ¶ 67 through 70 and 73. The FCC also asks whether it should establish guidelines for states to apply in determining whether physical collocation is not practical. NPRM at ¶ 72.

The FCC does not need to establish guidelines for the states to apply in reaching factual determinations, such as whether physical collocation is practical. In Ohio, the PUCO exercised the option granted by the FCC in CC Docket NO. 91-141 to adopt a form of collocation different from the one adopted on the federal level. We determined that policy objectives and the public interest are well served with negotiated interconnection, subject to certain minimum standards pertaining to virtual collocation and limited by the FCC's 91-141 order to Tier 1 LECs operating in Ohio. *See In the Matter of the Investigation Relative to Expanded Interconnection with Local Telephone Company Facilities*, Case No. 92-1992-TP-COI, Finding and Order (February 16, 1993). (Attachment A.) The PUCO decided that every negotiated collocation arrangement was to be submitted to the PUCO for approval prior to becoming effective. Additionally, Ohio undertook the responsibility for resolving bona fide disputes, much in the same manner as Section 251(c)(6) requires the states to do now. The PUCO Staff continues to believe that Ohio and the other states can thoroughly review the facts and circumstances to determine if a carrier may provide virtual collocation in accordance with Section 251(c)(6) of the 1996 Act. Specific FCC regulations in this regard could undermine the progress already made by states like Ohio.

c. Unbundled Network Elements (¶¶ 74-116)

In the NPRM, the FCC discusses Sections 251(c)(3) (d)(1), and (d)(2). The FCC tentatively concludes that it should develop a minimum set of

network elements that ILECs must unbundle. NPRM at ¶ 77. The FCC further concludes, pursuant to Section 252(e)(3), that the states may require additional unbundling of ILEC networks beyond the FCC established minimums. NPRM at ¶ 79. The FCC also raises the question of its ability to assume state responsibility [under Section 252(e)(5)] without explicit nationwide requirements having been established. NPRM at ¶ 80. The FCC seeks comment on these tentative conclusions and questions.

The PUCO Staff agrees with the FCC's tentative conclusions in that the FCC is obligated to identify network elements that ILECs should unbundle and such obligation should be met through the identification of a minimum set of network elements that ILECs must unbundle for any requesting telecommunications carrier. As the FCC has recognized, Section 252(e)(3) of the 1996 Act preserves state authority to impose other requirements. NPRM at ¶ 78. In this regard, the PUCO Staff agrees with the FCC's tentative conclusion that states may require additional unbundling of ILEC networks. However, the PUCO Staff is concerned that, should states impose unbundling requirements beyond those imposed by the FCC, ILECs will be encouraged to obfuscate negotiations and appeal state arbitrations in order to possibly have their interconnection agreements subject to the lesser unbundling requirements of the FCC. To alleviate this concern, the PUCO Staff recommends that the FCC place language in its order that would make it clear that ILECs cannot be relieved of additional state imposed unbundling requirements which do not conflict with the 1996 Act, notwithstanding the jurisdiction in which an interconnection agreement or request for interLATA authorization is reviewed.

The PUCO Staff agrees with the FCC that minimum guidelines governing unbundling as identified in the NPRM would enhance the ability

of new entrants to take advantage of economies of scale and to plan networks stretching across state and LEC boundaries. NPRM at ¶ 79. In addition, such minimum requirements or standards regarding unbundling would enhance the ILECs' ability to accommodate competitive requests by eliminating the potential of unknown standards between states or even between individual interconnection agreements.

The PUCO Staff believes that minimum technical guidelines will ensure the interoperability between networks of competing and non-competing carriers. Minimum guidelines regarding the provisioning, servicing, or other treatment governing unbundling should be broadly based on a nondiscrimination standard. Such minimum guidelines would require all ILECs to provide unbundled network elements to competitors on the same terms and conditions, with the same service intervals and provisioning practices as they provide bundled and unbundled network elements to themselves, affiliates, and other non-competitors.

The PUCO Staff believes that national minimum guidelines would, as stated above, benefit competitive entry and further would provide the FCC with the standards necessary to carry out its responsibilities under Section 252(e)(5) if the state commission fails to act. Furthermore, minimum guidelines would enable states that have not adopted unbundling requirements to still evaluate BOC entry into interLATA services under Section 271(d)(2)(B). However, the PUCO Staff believes that Section 252(e)(3) clearly allows for variation among the states. While national minimum guidelines do seem appropriate from a policy perspective, another legal consideration is that any guidelines that prevent the states from imposing additional requirements could violate Section 252(e)(3) of the 1996 Act.

Further, the FCC asks for information regarding the unbundling policies that states may have adopted. The FCC points out that some states have implemented unbundling on a request basis, while other states have ordered that essential elements be unbundled even without a request. NPRM at ¶ 81.

While some states have determined an essential set of LEC network elements that must be unbundled other states have selected the more market-based approach of requiring unbundling, only upon request. The PUCO is strongly in favor of request-based unbundling. The PUCO Staff recommends that the FCC adopt an approach which would require LECs to provide unbundled network components within a reasonable timeframe upon a bonafide request. In Ohio, the PUCO staff is recommending that LECs be required fulfill bonafide requests for unbundled network elements within 30 days from the signing of a negotiated or arbitrated interconnection agreement. Requiring unbundling only after a showing of demand through a bonafide request ensures that unbundling meets demand rather than exceeds it and eliminates the costs of unbundling those unrequired network elements. Furthermore, by setting a timeframe in which requests for unbundled network elements must be met, LECs would be prevented from unnecessarily hindering competition through deliberate delaying tactics.

(1) Network Elements, (¶¶ 83 - 85)

In the NPRM, the FCC discusses the definition of network elements and whether it should adopt a static list of network elements or a broader dynamic definition that could be redefined or subdivided by states. NPRM at ¶¶ 83-85. The PUCO Staff believes that the language of Section 251(c)(3) supports the FCC's broader definition of network element. No prior

restrictions should be placed on the definition of a network element. The FCC should develop a minimum list of network elements that ILECs would be required to unbundle upon a bona fide request. However, such a minimum list should not preclude the states, requesting carriers, or the FCC from determining that certain sub-components of the minimum network elements might also be included under the definition of any technically feasible point.

The PUCO Staff does not believe the distinction the 1996 Act makes between the facility or equipment used in the provision of a telecommunications service and the service itself should be read to obligate the requesting carrier to provide the customer with all the services that use the network element. To require such service offerings would be contrary to the market-based interests of the 1996 Act. In particular, that interpretation would unnecessarily stifle creativity and innovation in the telecommunications industry by dictating the specific services to be provided by common carriers.

The FCC draws attention to the relationship between Sections 251(c)(3) and (4). The FCC questions whether subsection (c)(3) in effect provides new entrants with an alternative way to "resell" the services of ILECs, in addition to the resale provision in Subsection (c)(4). NPRM at ¶ 85. The interplay of Sections 251(c)(3) and 251(c)(4) is very significant. Under one reading, the 1996 Act would seem to provide new entrants with an alternative way to "resell" and, thereby, take advantage of potentially lower unbundled rates which in aggregate, would allow their offering re-bundled services while incurring costs potentially lower than would be borne in purchasing services for resale at retail less avoided cost. IXC new entrants could also avoid the joint-marketing restrictions of Section 271(e)(1) under such reading. The

PUCO staff endorses an alternative reading. Section 251(c)(3) requires an ILEC to provide unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. This requirement clearly contemplated a requesting carrier combining the acquired unbundled network elements with elements of its own network. It should not be read that requesting carriers would be able to acquire all the necessary network elements of a particular retail service from an ILEC, re-bundle those same elements, and then resell the service to its subscribers. Such a reading would render Section 251(c)(4) largely moot. It would encourage all carriers to purchase unbundled elements pursuant to Subsection (c)(3) and avoid purchasing services for resale pursuant to Subsection (c)(4).

(2) Access to Network Elements (§§ 86 - 90)

The FCC examines the interpretation of access to unbundled network elements and technically feasible points of unbundling. The FCC asks whether states, rather than the FCC, may practically apply a dynamic definition of access to network elements on an unbundled basis at any technically feasible point during the arbitration process. Furthermore, the FCC asks for comment on its tentative conclusions that: (1) LECs have the burden of proving that it is technically infeasible to provide access to a particular network element; and (2) one LEC's unbundling evidences the technical feasibility for another similarly structured LEC network. NPRM at ¶ 87.

Ultimately, the PUCO Staff believes that, beyond any minimum levels of unbundling established by the FCC or states, the final definition of "technically feasible" unbundling should be left to the marketplace. If a carrier requests an unbundled component which has not previously been

offered on an unbundled basis, that component should be examined for technical feasibility. The state commission's duty under Section 252 to review all interconnection agreements adopted by arbitration, includes a review of the terms regarding access to network elements. In Ohio's view, a dynamic definition of "technically feasible" unbundling can be best applied during the state arbitration process, if warranted, and nothing in the 1996 Act precludes such an application. The PUCO Staff also believes that a given determination of the definition of "technically feasible" unbundling is a fact-intensive inquiry and should be by the state arbitrators, not the FCC. We agree with the FCC's tentative conclusion that the LECs have the burden of proving the technical infeasibility of providing access to a particular network element. NPRM at ¶ 87. The LEC's ownership and control of the pertinent network element puts them in the best position to demonstrate why they cannot provide access to that element. If two networks are truly similarly structured, it stands to reason that it is technically feasible to unbundle both in a similar manner.

(3) Specific Unbundling Proposals

(a) Local Loops (¶¶ 94 - 97)

The FCC focuses on the definition and delineation of the local loop. The FCC tentatively concludes that it "should require further unbundling of the local loop." NPRM at ¶ 97. The FCC seeks comment on the propriety of requiring unbundled access to loops prior to their concentration or multiplexing. NPRM at ¶ 97.

The PUCO Staff agrees that requiring unbundling only to the level of the entire local loop is probably not sufficient to promote efficient competition. The PUCO Staff would not object to the FCC's establishment of

minimum unbundling levels which divided the loop into its feeder and distribution portions. Again, we reiterate that the ultimate level of unbundling should be determined by the market. For example, if a new entrant has major distribution facilities deployed in a community (e.g. two-way coaxial cable), it may not need access to the ILEC distribution facilities at the lowest level. Instead, it may be more efficient for the new entrant to gain access at the local pedestal locations.

(b) Local Switching Capability
(¶¶ 98-103)

The FCC discusses the Illinois Commerce Commission's "local switching platform" approach to switch unbundling. The FCC seeks comment on this and alternative approaches. NPRM at ¶ 100. The PUCO Staff would not be opposed to a local switching platform unbundling requirement such as that adopted in Illinois. However, because other states have defined switch unbundling in differing ways, the PUCO Staff believes the best solution would be for the FCC to recognize the several major approaches to switch unbundling and identify the minimum requirements that would apply to each approach. This would enable states that have proceeded with unbundling to continue without backtracking and potentially creating significant delays in the introduction of viable local competition in those states.

d. Pricing of Interconnection, Collocation, and
Unbundled Network Elements

(1) Commission's Authority to Set
Pricing Principles (¶¶ 117 - 120)

The FCC tentatively concludes that it has authority under Section 251(d) to adopt pricing rules to ensure that rates for interconnection, unbundled network elements, and collocation are just, reasonable, and

nondiscriminatory. NPRM at ¶ 117. The NPRM further cites other language from Section 251 in which LECs are required to provide services at reasonable rates and/or establish reciprocal compensation arrangements. NPRM at ¶ 117. The FCC derives from these provisions a statutory duty to establish pricing principles. The NPRM also concludes that the FCC has the statutory authority to define what wholesale rates are for purposes of resale, and also what is meant by reciprocal compensation arrangements for transport and termination of telecommunications. NPRM at ¶ 117.

The NPRM fails to cite any specific language from the 1996 Act which expressly authorizes the FCC to establish pricing standards. The statute does not give the FCC authority to establish pricing standards nor does the statute give the FCC authority to define wholesale rates or reciprocal compensation arrangements. There is no such language in the 1996 Act to this effect. Section 251(d)(1) specifically provides that "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996, the FCC shall complete all actions necessary to establish regulations to implement the requirements of this Section." This Section, the FCC claims, provides the authority for the FCC to establish pricing standards and define pricing terms, however, there is no express language that provides such statutory authority. NPRM at ¶¶ 117 - 118.

Within the same paragraph (Section 251(d)) of the 1996 Act from which the FCC derives its authority to establish national pricing standards, another sentence, Section 251(d)(3), explicitly provides that the FCC shall not preclude the states from enforcing or implementing the requirements of Section 251 as long as the state's policy is consistent with Section 251. This provision allows the states to enforce the requirements of this Section. If the FCC establishes a set of pricing standards that are not consistent with state law, states might be

unable to enforce the FCC's principles. In order for states to enforce or implement any FCC-established pricing rules or regulations, these rules shall be consistent with state law.

If the FCC dictates an alternative non-traditional pricing scheme, some states may not have authority under state law to enforce these regulations. In order for the consistency throughout the nation. Consistency, however, does not mean strict uniformity in every state as to national pricing standards. As set forth in Section 251(d)(3), the 1996 Act allows for state flexibility as long as state action is consistent with the 1996 Act. An objective reading of the statute is that it does not direct the FCC to establish, under Section 251(d), uniform national pricing rules nor to define "wholesale rates"¹⁰ and reciprocal compensation arrangements by dictating specific pricing standards.

The NPRM provides that the pricing requirements of Section 251, as elaborated in Section 252, require the FCC to establish pricing principles interpreting and explaining the provisions of Section 252(d) for states to apply. NPRM at ¶ 118. The FCC derives its authority to establish these principles from no specific language in the 1996 Act. To the extent that states are preempted by the establishment of such pricing prohibition policies, the FCC's interpretation conflicts with the Congressional prohibition against implied preemption under the 1996 Act. *See*, Section 601(d). More directly, Congress, through the enactment of Sections 251(d)(3) and 252(d)(1), directly provided that the states should have a substantial role in determining a just and reasonable rate for interconnection and other network element charges.

¹⁰ Section 252(d)(3) of the 1996 Act expressly provides that the "[s]tate commission shall determine wholesale rates on the basis of retail rates charged to subscribers". The 1996 Act includes no reference to a definition provided by the FCC. If Congress intended for the states to look to the FCC's definition of wholesale rates, there would be such a specific provision in the 1996 Act.

Section 252(d)(1) expressly allows state commissions to determine if interconnection rates are just and reasonable. Section 252(d) clearly provides that the states, not the FCC, will determine if the rates are reasonable.

The 1996 Act establishes how states are to determine whether the rates are reasonable. If Congress intended for states to determine reasonableness according to the FCC's requirements, this language would have been included in Section 252(d), entitled "Pricing Standards." Instead, Congress provided that rates are to be set by the states and that rates shall be "(i) based on the cost . . . of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and may include a reasonable profit." Section 252(d)(1) of the 1996 Act. Within the Pricing Standards provision itself, Congress made no reference to national pricing principles to be established by the FCC. Congress went so far as to supply specific criteria for the *states* to use in making its determination, but did not refer to any FCC pricing principles. Accordingly, the NPRM's conclusion that the FCC has jurisdiction to establish national uniform pricing standards is in error. NPRM at ¶ 117, 118, and 120.

The NPRM requests comments regarding the predictability of rates if the FCC establishes national pricing principles and also requests comments on the consequences that may arise if the FCC does not set specific pricing principles. NPRM at ¶ 119. The NPRM states that having national pricing standards would ease administrative burdens as well as facilitate negotiation, arbitration, and review of agreements between ILECs and competitive providers. NPRM at ¶ 119. If the FCC establishes national pricing principles, those principles may not be easily applied to each LEC. Each negotiation, arbitration, and agreement will be unique and to apply national standards to each set of circumstances would undercut the 1996 Act's goal of promoting

competition and eliminate the variances inherent in such negotiations, as envisioned by Congress. If these pricing principles conflict with state law,¹¹ the states will be unable to implement the national principles. On the other hand, the states, if given the flexibility, could establish pricing principles that comply with state law *and* a broader set of guidelines under the 1996 Act. By complying with the 1996 Act, there would be sufficient consistency and predictability maintained throughout the nation. Therefore, a more detailed set of national regulations created by the FCC is not necessary for predictability, as the 1996 Act itself provides national rules and regulations.

(2) Statutory Language (§ 121)

The FCC seeks comment on the proper interpretation of the statutory provisions in Sections 251(c)(2)(D), 251(c)(3), 251(c)(6), and Section 252. NPRM at § 121. The FCC also seeks comment on any specific principles that parties believe the FCC should promulgate to ensure that the rates established or approved by states are just, reasonable, and nondiscriminatory. In addition, the FCC seeks comment on the national pricing principles that states might apply in setting and reviewing rates for interconnection, collocation, and access to unbundled network elements. The FCC further seeks comment on what enforcement or monitoring mechanism, if any, the FCC or the industry should adopt to ensure that all carriers comply with any pricing principles that the FCC establishes. NPRM at § 121.

The PUCO Staff believes the provisions set forth in Sections 251(c)(2)(D), 251(c)(3), and 251(c)(6) clearly establish that rates shall be just,

¹¹ Section 252(e)(3) states that nothing in Section 252 shall prohibit a state commission from establishing or enforcing other requirements of state law in its review of an agreement, including requiring compliance with intrastate telecommunication service quality standards or requirements. Congress clearly intended and contemplated that states would be able to comply with both the Act and state law.

reasonable, and nondiscriminatory for interconnection, unbundled access, and collocation services. It is equally clear that these rates shall be based on cost, though not on cost as determined through a rate-of-return or rate-based proceeding, and that those rates shall be nondiscriminatory and may include a reasonable profit as set forth in Section 252(d)(1). However, the 1996 Act gives little direction for determining such costs with specificity. The PUCO Staff believes costs should be determined on a long run service incremental cost (LRSIC or TSLRIC) basis. Ohio and other states are capable of determining costing and pricing principles tailored to local circumstances for reviewing and setting rates for interconnection, collocation, and access to unbundled network elements. In the alternative, if national pricing principles are mandated by the FCC, the PUCO Staff recommends that Ohio's principles be adopted.

The PUCO Staff recommends that ILEC's prices for network functionalities, facilities, and services available to other carriers must be set at a level that allows the providing carrier the opportunity to recover the cost of providing such functionalities, facilities, and services. Accordingly, prices should be set at a level that allows the providing carrier to recover its LRSIC to provide such functionalities, facilities, and services, as well as joint costs and a reasonable contribution to common costs incurred by that carrier. The appropriate contribution level may differ among various network functionalities, facilities, and services. However, essential, non-competitive functions and services included in the definition of the state universal service should bear no more than a reasonable share of the joint and common costs of resources used to provide these services in accordance with Section 254. The PUCO Staff recommends that all carriers be required to file carrier resale tariffs with the state commissions and that the states establish

tariff review procedures to ensure that just, reasonable, and nondiscriminatory rates are set and maintained. Requiring that carrier resale tariffs reflecting wholesale prices be filed and reviewed by the states will help to ensure equal treatment between resellers and carriers and will provide for affordable rates to end users.

The FCC invites parties to comment on whether there are any reasons to make a distinction between the pricing principles for interconnection and unbundled network elements. NPRM at ¶ 122. The PUCO Staff believes that the pricing principles for interconnection and unbundled network elements are consistent and provide that the ILEC recovers its cost (i.e., long run service incremental cost) (LRSIC) for providing interconnection and unbundled network elements, as well as joint costs and a reasonable contribution to common costs incurred by the carrier. In developing LRSIC for interconnection and unbundled network elements, the ILEC should reflect any costs associated with the unbundling of network elements and reflect any costbased volume discounts. Prices for unbundled network elements should be permitted to be de-averaged to reflect cost-based considerations. Additionally, the costs to be recovered should reflect other cost savings resulting from selling unbundled network elements at wholesale rather than bundled retail services.

(3) Rate Levels (¶ 123)

The FCC seeks comment on the meaning of Section 252(d)(1), which enunciates that rates for interconnection and network elements shall be based on the cost and such cost shall be determined without reference to a rate-of-return or other rate-based proceeding. NPRM at ¶ 123. The PUCO Staff concurs with the FCC that the 1996 Act provides that interconnection